A

PP

v.

MERVYN CHAN

B

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL RAHMAN SEBLI J
[CRIMINAL TRIAL NO: 46-01-2010]
8 MAY 2011

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Trafficking in dangerous drugs - Proof of case beyond reasonable doubt - High Court interpreter caught red-handed with package containing drugs - Statutory presumptions of knowledge and trafficking unrebutted - Dangerous Drugs Act 1952, s. 37(d) & (da)*

D

The accused, an interpreter with the High Court at Miri, was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') with trafficking in 460g methamphetamine in front of the Poslaju office in Jalan Pos, Miri on the afternoon of 29 January 2010.

E

According to the prosecution's case, police received information that a package containing illegal drugs was being sent by Poslaju addressed to the accused at the Court Complex at Miri. Police located the package at the Maskargo office in Miri and found

F written on it, the accused's name, the address of the court complex and a cellphone number. A policeman disguised as a mail operator, accompanied by a Poslaju employee, took the package to the Miri High Court complex intending to hand it over to the accused. When they called the cellphone number written on the

G package a person claiming to be Mervyn Chan answered. He was asked to come down to collect the package but he failed to do so. As the policeman and the Poslaju employee were returning with the package to the Miri Poslaju office, a call came from another cellphone number, later found to be registered in the

H accused's name, asking where the package was. The caller was told to collect the package at the Poslaju office. The accused later turned up at the Poslaju office to claim the package and as he was leaving the place, he, and another person named Raymond Sim (PW9), who was at the scene, were arrested by police. The

I package was found to contain 460g of methamphetamine.

Held (finding the accused guilty of the charge, convicting him and sentencing him to death):

(1) The case against the accused was proved beyond reasonable doubt. (para 74)

(2) The accused's allegation that he was tricked by PW9 into collecting the package was rejected. It beat reason why it was necessary for the accused to collect the package on PW9's behalf when PW9 himself was around, as a matter of fact, sitting next to him on their way to the Poslaju office. PW9 had nothing to do with the drugs and the cellphone number written on the package did not belong to him. No one asked the accused to collect the package. It was his package and he went to collect it. (paras 37 & 64-65)

(3) The accused failed to rebut the presumption of knowledge under s. 37(d) of the Act. As for the presumption of trafficking under s. 37(da), the accused did not produce any evidence to show the drugs were not for the purpose of trafficking. Therefore, the presumption of trafficking remained unrebutted and established by default. (paras 70-71)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Chin Yoke [1939] 1 LNS 66 HC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Ibrahim Mahmud [2001] 3 CLJ 284 HC ***(refd)***
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Sukumaran Sudram [1999] 4 CLJ 242 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Zulfakar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(4), 182A(1)
Dangerous Drugs Act 1952, s. 37(d), (da), (xvi)
Evidence Act 1950, ss. 91, 157

For the accused - Orlando Chua; M/s Orlando Chua & Co
Ranbir Singh; M/s Ranbir S Sangha & Co
For the prosecution - Robert Pasang Alam DPP (Shahidah Muslimah & Mohd Syakil Zulkifli DPP's with him); AG's Chambers

Reported by Ashok Kumar

JUDGMENT

Abdul Rahman Sebli J:

The Charge

[1] The accused, a Chinese Interpreter attached to the High Court at Miri, Sarawak was indicted with an offence specified in the following charge:

> That you on the 29th of January, 2010 at about 1.05 p.m., in front of Pejabat Poslaju, Jalan Pos, Miri, in the District of Miri, in the State of Sarawak, on your behalf, did traffic in dangerous drugs, to wit, 460 grams of Methamphetamine and you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 punishable under section 39B(2) of the same Act.

[2] He claimed trial to the charge at the conclusion of which I found him guilty and sentenced him to death. These are my grounds.

The Salient Facts

[3] The prosecution's evidence which I accept as true and accurate is as follows. On 29 January 2010 at about 5.30am, while he was at home at Kompleks Perumahan Polis, IPD Miri Sarawak, ASP Gabriel ak Risut (PW2) who was head of the Narcotics Department IPD Miri received information about a package that was being sent to Miri *via* Poslaju and addressed to a person by the name of Mervyn Chan of Kompleks Mahkamah Miri, Jalan Merdu, Miri. He did not know who this person was. The informer also told him that the package number was EN236031124MY and sent from Damansara Utama Selangor.

[4] Acting on such information PW2 swung into action. He gathered his men and proceeded to Poslaju Miri later in the morning where they met a Poslaju worker to enquire about the package. PW2 was told by the Poslaju worker that the package had not arrived. PW2 then instructed Corporal Sukhamin to be with Poslaju mail operator Hafez bin Edris (PW10) to drive to the Maskargo office Miri to check on the package. PW2 and the rest of his team followed from behind in PW2's car.

[5] At Maskargo office they managed to trace the package, which was then brought to the Poslaju office by PW10 accompanied by Corporal Sukhamin. Following behind was PW2 and his team. The reason why PW2 followed from behind was because there had been instances in the past where Poslaju vans carrying prescribed drugs were stopped by drug syndicates or unknown persons who claimed the packages during the journey from Maskargo to Poslaju Miri.

[6] At the Poslaju office, PW2 examined the package. It was a square shaped package wrapped with white paper (P10). The name of the receiver written on the Poslaju form was "Mervin Chan" of "Komplek Mahkamah Miri, Jalan Merdu, 9800 Miri, Sarawak". A cell phone number 0128501282 was also written on the form. The sender was "Beauty Lumierie, 28A & 30A Jalan SS21/62, 47400 Damansara Utama Selangor" with the sender's cell phone number written as 0193897063. Photographs of the package in its unopened state can be seen at exh. P13(1) & (2).

[7] After examining the package PW2 went to see the Manager of Poslaju Miri to enquire about the procedure for delivery of parcels to the intended receivers. PW2 sought permission from the Manager to allow Constable Affandi to disguise himself as a mail operator by wearing a mail operator uniform. The plan was for Constable Affandi to hand over the package to the intended receiver at the given address. Constable Affandi and the Poslaju mail operator (PW10) then proceeded to the Miri High Court complex in a Poslaju van to deliver the package to the intended receiver Mervyn Chan. PW2 was on standby at the court building.

[8] On arrival at the Miri High Court complex PW10 alighted from the Poslaju van and walked into the court building and called cell phone number 0128501282 written on the package. Constable Affandi remained in the Poslaju van. When the call was answered PW10 asked whether the person at the other end of the line was Mervyn Chan and the male person answered in the

affirmative. PW10 told him that he was from Poslaju and that there was a package for him and asked him to come down to collect it.

[9] As PW10 was waiting for Mervyn Chan to come down to collect the package, a court staff by the name of Zamie bin Hadni (PW6) suddenly appeared and asked if there was any letter for the court to which PW10 replied there was only a package for Mervyn Chan. PW6 asked if he could collect it on behalf of Mervyn Chan. He was told that only Mervyn Chan could do so. PW6 then left. In fact PW2 had earlier given instruction that no one else other than Mervyn Chan could collect the package. PW2 then instructed Constable Affandi to get back to Poslaju Miri together with the package.

[10] As PW10 was driving back to the Poslaju office he received a call from a male person whose voice sounded like the voice of Mervyn Chan whom he spoke to earlier. This call came from cell phone number 0198498585 which was registered in the name of the accused. The male person asked PW10 where his "barang" was. PW10 told him that he was on his way back to the office and asked him to collect the package at the Poslaju office.

[11] The accused eventually turned up at the Poslaju office at about 1pm on the same day. According to Post Assistant Shirley ak Nyegang (PW5) she handed the package to the accused at the counter after the accused signed the delivery run sheet (P33) which PW5 filled in based on the identity card number of the accused which he passed to her. According to PW5 this was not the first time the accused had collected his parcels from the Poslaju office. He had claimed his parcels on two to three occasions before.

[12] As the accused was making his exit at the entrance of the Poslaju office and holding the package in his left armpit, Lance Corporal Andrew ak Engkok (PW7) rushed towards him from behind and identified himself as a police officer. The accused was surprised and shocked ("terkejut dan tergamam") and turned towards PW7. At the same time he lowered the package that he was holding. Although in cross examination PW7 agreed with counsel that the accused was slightly bemused and confused when he was approached by him, he explained in re-examination that he was confused by counsel's question. This is an acceptable

explanation. A person may be confused upon being stopped by the police but to be bemused is abnormal. The package and the accused's cell phones (P11 and P12) were seized by PW2.

[13] The accused was then brought to the police station Miri together with one Raymond Sim See Jun (PW9) who was also arrested at the scene. The package was opened and examined in the presence of the accused and PW9. It was found to contain two boxes, one red (P14) and the other green (P15). Each of the boxes in turn contained two polysterene boxes (P17, P21) inside which were found four empty bottles (P20(a), P20(b), P22(a), P22(b)) and four plastic packets (P18, P19, P23, P24) containing substances suspected to be syabu.

[14] A clearer picture of the contents of the two boxes (P14 and P15) can be seen in the photographs at P13(8)-(13). In all there were 12 transparent plastic packets containing crystalline substances suspected to be syabu found inside the package seized from the accused - P8(a)-(f) and P9(a)-(f).

[15] The crystalline substances were sent for analysis and confirmed by the Chemist (PW1) to contain 460 grammes of Methamphetamine, a dangerous drug listed in the First Schedule of the Dangerous Drugs Act 1952 ("the Act"). I find no reason not to accept the evidence of PW1. Possession of 50 grammes of this substance attracts the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952 ("the Act"). The amount in this case is almost 10 times the prescribed minimum.

[16] Learned counsel for the accused submitted that there was a break in the chain of evidence regarding the drug exhibits. According to counsel, PW1 testified that she received 24 plastic packets when there should only be 12 packets. With due respect I do not find this to be borne out by the evidence. I have examined PW1's evidence carefully and it is clear to me that her evidence taken in its entirety shows that she only received 12 packets from the police and not 24 as alleged by counsel. Her report at P4 also shows that she received 12 envelopes, marked 'E1' to 'E12'. Further, her testimony is that she examined only 12 packets. This part of her evidence was not challenged at all in cross examination and is therefore deemed to be admitted: *Wong Swee Chin v. PP* [1980] 1 LNS 138; *Browne v. Dunn* [1893] 6 R 67.

A **Whether *Prima Facie* Case Established**

[17] A *prima facie* case is made out where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction: See s. 180(4) of the Criminal Procedure Code ("the Code"). It is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side: *PP v. Chin Yoke* [1939] 1 LNS 66; *PP v. Sukumaran Sudram* [1999] 4 CLJ 242; *Balachandran v. PP* [2005] 1 CLJ 85. In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 the Federal Court laid down the following test to determine whether a *prima facie* case has been established:

> Put shortly, what the court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] CLJ 101 (Rep); [1983] 2 CLJ 10; [1983] 2 MLJ 232. If the answer to the question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[18] The Federal Court also held that the evidence led by the prosecution must be subjected to a maximum evaluation and the witnesses must be found to be credible witnesses and if the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused: see also *Tai Chai Keh v. PP* [1948] 1 LNS 122; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[19] In *Liew Kaling & Ors v. PP* [1960] 1 LNS 60 the Malayan Court of Appeal laid down the rule that before an inference can be considered to be a valid one it must comply with two conditions, namely:

(1) It must account for all the known facts; and

(2) It must be the only reasonable inference which will account for all these facts.

[20] On the evidence and having regard to the principles applicable, I am satisfied that a *prima facie* case had been established by the prosecution. It is clear to me that the accused

was knowingly in possession of the drugs. The word "possession" is not defined by the Act but was given the following meaning in *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing.

[21] What the prosecution needs to prove is possession, not exclusive possession: see *PP v. Denish Madhavan* [2009] 2 CLJ 209 where the Federal Court said:

> It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person – that is "exclusive" – that a conviction is possible.

[22] The prosecution must prove that there is first, a physical control over the controlled drug, and second knowledge of the existence of the thing itself, that is, the existence of the controlled drug, but not the name nor nature of the drug: see *PP v. Mohd Farid Mohd Sukis & Anor* [2002] 8 CLJ 814.

[23] Whether or not the accused had knowledge of the drugs must be judged from his outward acts or omissions: see *PP v. Badrulsham bin Baharom* [1987] 1 LNS 72. It is very often a matter of inference: *Mohd Farid bin Mohd Sukis & Anor, supra*. In *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 Lord Morris made the following pertinent observations relating to possession:

> If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, I would suppose there would be no possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in

A possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to them, it seems to me that he would nevertheless be in possession of them.

B **[24]** The fact that the drug was concealed in a nicely wrapped package and not visible from the outside does not mean that an inference of knowledge cannot be drawn. In *Zulfakar Mustaffah v. PP* [2001] 1 SLR 633 the Supreme Court of Singapore dealt with the issue in the following manner:

C In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

D 22. We were unable to accede to this request. Whilst the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise drug peddlers could escape liability simply by ensuring E that any drugs coming into their possession are firstly secured in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at p. 438):

F In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

G **[25]** The above passage was quoted with approval by the Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337. In the present case the accused was caught red handed with the package, which was addressed to him. He was also the person who collected the package from PW5 at the Poslaju counter. He had earlier called PW10 to enquire about the package after failing H to show up despite being told by PW10 to come down to collect it. He did not explain to PW10 why he was unable to come down to collect the package. Based on the records at P37 and P38 the time gap between PW10's call to number 0128501282 and the call by the accused to PW10 using number 0198498585 I was 10 minutes. The accused must have sensed something amiss and wanted to make sure his illicit activity had not been detected by the authorities.

[26] As for the court staff Zamie bin Hadni (PW6) it appears that he knew PW10 had arrived with a package for the accused. The evidence of PW10 it will be recalled is that PW6 suddenly appeared while he was waiting for the accused to come down to collect the package. He asked PW10 if he could collect it on behalf of the accused. In cross examination PW6 testified that he had never accepted Poslaju packages on behalf of his other colleagues before.

[27] It is possible that after receiving the call from PW10 the accused, wherever he was, asked PW6 to collect the package on his behalf. As for the call made to PW10 using number 0198498585, there is no doubt whatsoever that it was made by the accused. It could not have been any other person having regard to the name and address written on the package and his subsequent act of collecting the package at the Poslaju office. It cannot be a coincidence that one and a half hours after PW10 received the call from number 0198498585, which was registered in the accused's name, the accused came to the Poslaju office to collect the package.

[28] The alleged confusion over the ownership of cell phone number 0128501282 is but an attempt by the accused to cast doubts in the prosecution's case that it was him who answered PW10's call on the morning of 29 January 2010. Despite his initial uncertainty I accept PW2's evidence that cell phones P11 and P12 were seized from the accused which he handed over to the Investigating Officer for further action. P12 used the number 0128501282.

[29] The fact that the accused called PW10 to enquire about the package after PW10 called number 0128501282 shows that he knew about the arrival of the package. The connection between the first call, the second call and the accused's act of collecting the package at the Poslaju office is all too obvious. It connects the dots on the question as to who the real owner of the package was.

[30] There is no doubt that when the accused went to the Poslaju office to collect the package he knew that it was meant for him and no one else. When stopped by the police he was shocked and surprised and intuitively lowered the package that he was holding. Being shocked and surprised on being stopped by

A the police is natural but what is not natural is there was no display of conduct consistent with innocence after the initial shock and surprise.

[31] If indeed the accused was not guilty of any wrongdoing, it B would have been natural for him to demand for an answer from the police why they were detaining him and why they were taking away his parcel and cell phones and then bringing him to the police station. Surely anyone caught in a situation like that would demand for an immediate answer. When the package was opened C in his presence at the police station the accused did not protest his innocence either. According to PW2 he did not even say anything, let alone to tell PW2 that he had been fixed. PW9 in his evidence confirmed that the accused did not say anything. He only appeared shocked.

D **[32]** The accused is a High Court interpreter and should know his rights when faced with such situation. To clam up in such a grave and potentially life threatening situation is wholly inconsistent with the behaviour of an innocent man. Even a driver stopped by the police for a minor traffic offence will protest his innocence if E he did not break any traffic law.

[33] Only one reasonable inference can be drawn from the accused's conduct and that is, he had resigned to the fact that he had been caught and there was nothing he could do. When F he proceeded to the Poslaju office to collect the package he must have thought that the coast was clear, unaware that the police were waiting in ambush. Knowledge has therefore been proved against the accused beyond any reasonable doubt. He was clearly in *mens rea* possession of the drug.

G **[34]** PW9 is a key prosecution witness. Not because he gave incriminating evidence against the accused but because his evidence cancels out the defence suggestion that the package belonged to him and that he tricked the accused into collecting it H on his behalf. PW9 is the accused's best friend and this is not disputed by the defence. He confirmed in material particulars the evidence of the police witnesses regarding the circumstances of the accused's arrest at the Poslaju compound and what transpired at the police station when the package was opened in front of both I of them.

[35] The whole foundation of the defence case is encapsulated in the following questions put to PW9 by counsel during cross examination:

> Q: I put it to you that you had called the accused incessantly on the morning of 29.1.2010 telling him you had ordered some health food product from Kuala Lumpur which was sent under his name as you weren't sure you would be back in time from overseas to collect them and you have put the accused on standby to collect them on your behalf once you were notified of the arrival of the same.
>
> Q: Also put to you that on the morning of 29.1.2010 on the pretext of going for lunch you had in fact wanted the accused to pick up a package on your behalf from the Poslaju office.

[36] Counsels act on their clients' instructions. They do not go on a frolic of their own when putting questions to an opposing witness on crucial matters affecting their clients' side of the story. Any diversion or conflict between what is put to the witness and what the accused says in his defence, if called, may be the subject of adverse comments by the other side.

[37] The suggestions were emphatically denied by PW9. There is no logic to the suggestions because the undisputed evidence is that PW9 was with the accused on the morning of 29 January 2010. It beats reason why it was still necessary for the accused to collect the package on behalf of PW9 when PW9 himself was around, as a matter of fact sitting next to him on their way to the Poslaju office. It is obvious that the line of cross examination was to lay the foundation for the defence case that the accused did not know the package contained dangerous drugs as he was told by PW9 that it contained health food products.

[38] The fact that the accused was in custody of the package is beyond dispute. He is therefore presumed to have known the nature of the drug by virtue of s. 37(d) of the Act. Accordingly the burden is on him to prove on the balance of probability that he had no knowledge. Section 37(d) provides as follows:

A 37. In all proceedings under this Act or any regulation made thereunder:

(d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in
B possession of such drug and shall, until the contrary is proved, to be deemed to have known the nature of such drug.

[39] It will be noted that s. 37(d) presumes not only knowledge but also "possession". What does the presumption of
C "possession" in s. 37(d) entail? Does it mean that upon proof of custody or control, "possession" as the word is understood in criminal law is presumed, meaning to say both the physical and mental elements are presumed "until the contrary is proved"? If that is the intended meaning it does not explain why there is the
D need to presume knowledge, the mental element of possession, in the same provision.

[40] It makes no sense to presume "possession" when custody or control, the physical component of "possession" has to be
E proved by affirmative evidence in order to invoke the presumption of "possession". Therefore the word "possession" in s. 37(d) cannot refer to *mens rea* possession. What s. 37(d) presumes is knowledge, not possession although it can be argued that if a person having custody or control of the drug is presumed to know
F the nature of the drug he is in fact presumed to be in "possession" of the drug. But that is not what s. 37(d) says.

The Presumptions Of Knowledge And Trafficking

[41] Section 37(d) of the Act presumes knowledge and s. 37(da)
G presumes trafficking. The presumption of knowledge is from custody or control whereas the presumption of trafficking is from possession. Failure to rebut the presumption of knowledge will lead to a finding that knowledge is established by default. As for the presumption of trafficking it must arise from affirmative evidence of
H possession and not possession "deemed" by s. 37(d): *Muhammed Hassan v. PP* [1998] 2 CLJ 170. Another view would be that since s. 37(d) does not presume possession the question of using the presumption of possession under that provision to presume trafficking does not arise. Possession must in all cases be
I established by affirmative evidence to invoke the presumption of trafficking.

[42] If the prosecution has evidence of knowledge, direct or circumstantial, there is no need to rely on the presumption under s. 37(d). It is only when the prosecution has no evidence of knowledge that they will rely on the presumption. However, once custody or control is established and the prosecution adduces no evidence of knowledge the court has no discretion not to invoke the presumption of knowledge.

[43] In *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 the Federal Court held the view that the prosecution may rely on the presumption under s. 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption of trafficking under s. 37(da) of the Act) that the accused was in fact trafficking in the dangerous drug.

[44] What is the consequence of a failure to rebut a statutory presumption? It has been decided by the Privy Council in *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89 that failure to rebut a statutory presumption will have the consequence of a conviction: This is how Lord Diplock put it at p. 92:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". *In such a case the consequence of finding that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction.* (emphasis added)

[45] The learned DPP indicated that the prosecution is not relying on the presumption of possession to invoke the presumption of trafficking. What he means perhaps is that the prosecution is not relying on the presumption of knowledge under s. 37(d). This is understandable in view of the rule against double presumption: *Muhammed Hassan, supra.* Rather, the prosecution is relying on affirmative evidence of possession, having proved knowledge without resort to the presumption under s. 37(d). Possession having been proved, the presumption of trafficking under s. 37(da)(xvi) applies against the accused. Section 37(da)(xvi) provides as follows:

A 37(da) Any person who is found in possession of -

(xvi) 50 grammes or more in weight of Methamphetamine;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved,
B to be trafficking in the said drug;

[46] The quantum of proof required to neutralize a statutory presumption is well settled. It is only on the balance of probability. The burden is discharged if the court considers it to be more
C likely than not that the fact presumed does not exist.

Parole Evidence

[47] In the course of argument learned counsel submitted that the prosecution is barred from relying on the oral testimony of
D PW2 as his evidence is caught by the parole evidence rule. Counsel's contention is that since the prosecution has tendered PW2's police report (P25) they could only rely on the report as substantive evidence and not on his oral evidence. The following passage in *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747 was
E cited in support:

> A Chemist report is not *per se* a 'matter' required by law to be in the form of a document as is the case of a police report under s. 107 of the CPC and a statement under s 112 of the CPC. But once the chemist report has been admitted as substantive
F evidence under s. 399 of the CPC, it falls squarely in that class of matter 'required by law to be reduced to the form of a document' under s 91 of the Evidence Act. It would not therefore be permissible by the operation of s 91 of the Evidence Act, for the prosecution to give any other evidence in proof of the matter
G except the document (the chemist report) itself.

[48] I am unable to accede to the counsel's argument. The prosecution is entitled to call any witness who could provide relevant evidence to support its case. There is no law to say that
H a witness who has lodged a police report is barred from giving oral evidence on matters he has stated in his police report. Section 91 of the Evidence Act 1950 refers to documents which have been reduced by or agreed by the parties to the form of a document and any matter required by law to be reduced to the form of a
I document. It does not refer to statements required by law to be reduced into writing. It will be straining the language of s. 91 to

give such construction and contrary to s. 157 which provides that former written statements made by a witness may be proved to corroborate his testimony. Section 157 of the Evidence Act provides as follows:

> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[49] If the law allows former written statements to be proved to corroborate the testimony of a witness it is contrary to logic and common sense to suggest that the witness whose testimony the law allows to be corroborated by such statements is prohibited from giving oral evidence. It is implicit in s. 157 of the Evidence Act that oral evidence may be given by a witness who has made previous written statements. If counsel's argument is to be followed to its logical conclusion a witness who makes a police report concerning a crime would be barred from giving evidence in court. That cannot be a correct proposition of law.

Duty Of Court At End Of Whole Case

[50] Section 182A(1) of the Code provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. If upon a review of the whole evidence there is a reasonable doubt as to the guilt of the accused, he must be acquitted: *PP v. Ibrahim Mahmud* [2001] 3 CLJ 284. Whereas here, the accused has a legal burden to discharge the court must consider whether he has succeeded in discharging that burden. The burden is either to rebut the presumption of knowledge under s. 37(d) or the presumption of trafficking under s. 37(da).

The Defence Case

[51] When called upon to state his defence the accused elected to give evidence under oath. His explanation is that a few days before 29 January 2010, his best friend Sim See Jun (PW9) called him by phone, asking him to collect a parcel as he (PW9) would be away outstation and was unsure when he would be back. He was told by PW9 that the parcel contained health products and would be sent by Poslaju to his (accused) address at Kompleks Mahkamah Miri.

[52] According to the accused although 29 January 2010 was a working day he was not in office on that day as it was his travelling day. He said he decided to stay at home to accompany his wife. He went on to testify that on that day he received a few text messages from PW9 which PW9 sent using number 0128501282 to his number 019498585. He said PW9 also called him at 8.43am but he did not answer.

[53] Then at 9.03am he received another sms from PW9 and this time the message from PW9 was "afternoon". He took it to mean that PW9's parcel would arrive in the afternoon. At 9.06am he texted the message "catch the snake" to PW9 when PW9 asked him whether he was working that day. He explained that by "catch the snake" he meant he was escaping from work. He disagreed with the learned DPP's suggestion that "catch the snake" was a secret code used by drug traffickers.

[54] At 9.08am he called PW9 at number 0128501282 from his number 0198498585 asking PW9 how he was supposed to collect the parcel. PW9 replied that he would sms to him the consignment number of the parcel. The consignment number was texted to him at 9.31am. However when asked if this particular text message was still in the data of the two cell phones (P11 and P12) the accused said it was not there anymore and he did not know why.

[55] Then at 11.18am the accused said PW9 called him from number 0128501282 telling him that the postman was at the court complex to which he replied "ok". At 11.21am PW9 texted him again from number 0128501282, this time telling him to come down. The message was "you can come down". The accused took this to mean that he could proceed to collect the parcel. PW9 had earlier provided him with the telephone number of the postman. At 11.27am he called the postman to enquire about the parcel and was told that the parcel was being sent to Poslaju office.

[56] At 11.30am PW9 called again and asked the accused "Have you called the postman?" and the accused answered in the affirmative and told PW9 that he would pick the parcel later. PW9's response was "Better pick it up now. Before that you can pick me at my mother's shop." Then he said to PW9 "I thought you are not in Miri". PW9 told him he had come back earlier from

his outstation trip and asked him to pick him up, then to take the parcel and after that to have lunch together. At 11.42am he called PW9 and told him that he was on the way to pick him up. At 11.46am PW9 called to tell him "You better come fast" to which he said "ok".

[57] After fetching PW9 at the accused mother's shop the accused proceeded to the Poslaju office but stopped on the way to drop PW9's brother Sim See Lei (DW6) at the bank. On his arrival at the Poslaju office the accused asked a lady staff whether there was a parcel for him. The lady staff asked for his identity card and went to the back of the office. Later she came back and passed the package to the accused after asking him to sign on a document. The accused said he signed the document and walked out of the office where he was asked by the police to follow them to the police station.

[58] At the police station the accused testified that the parcel was opened in front of him and PW9. He said he was shocked after being informed by PW2 that the parcel contained drugs. He told PW2 that he did not know it contained drugs and that he was asked by PW9 to collect the parcel and was told by PW9 that it contained health slimming products.

[59] The accused further testified that PW9 ran a few businesses including a slimming centre called "Unisense Slimming Centre" located at the Boulevard Commercial Centre but was no longer in operation at the time of his arrest. He testified that when PW9 told him that the parcel contained health slimming products he had no problem believing him because PW9 had told him he wanted to open a new slimming centre. As for the cell phone number 0128501282 the accused said he never used that number.

[60] In cross examination the accused testified that he had travelled to Thailand, Macau, China, Hong Kong, Cambodia and Singapore for leisure. He said he only bought the air tickets for these trips and that his accommodation and food were paid for by PW9 and his brother DW6. Asked what was his last drawn salary as a court interpreter he said it was RM1,500. After deducting expenses the balance per month was RM83. However he was quick to explain that he earned extra income from working as "person in charge" in his uncle's bus company.

[61] The accused was asked why his best friend PW9 or DW6 whom he had known for 17 years would want to victimize him. He said he would not know why. He denied the learned DPP's suggestion that PW9 knew nothing about the parcel and its contents. When asked why he did not ask PW9 why he used his office address to deliver the package the accused said he did ask PW9 and the reason given by PW9 was that since it was him who was going to collect the package it was better to use his office address.

Evaluation Of Accused's Explanation

[62] The clear impression I get from the accused's explanation is that having been caught with the drug he had to try to push the blame on PW9 as a convenient scapegoat. His case is that although the package containing the drug was addressed to him it was intended for PW9. It is obvious that his explanation is tailored to counter PW9's evidence that he never asked the accused to collect the package and never owned cell phone number 0128501282. The accused took pains to stress the point that each time he communicated with PW9 on 29 January 2010 it was to number 0128501282. He seems to be obsessed with this number perhaps due to the fact that this was the cell phone number written on the package.

[63] The accused testified that PW9 called him a few days before 29 January 2010, asking him to collect the parcel as he (PW9) would be away outstation and unsure when he would be back to collect the package. The credibility of this allegation is suspect because what was put to PW9 in cross examination is that this call was made by the accused incessantly on the morning of 29 January 2010 itself, not a few days earlier as he now claims. Reproduced below is the question put to PW9 in cross examination:

> Q: I put it to you that you had called the accused incessantly on the morning of 29.1.2010 telling him you had ordered some health food product from Kuala Lumpur which was sent under his name as you weren't sure you would be back in time from overseas to collect them and you have put the accused on standby to collect them on your behalf once you were notified of the arrival of the same.

[64] Given the importance of his evidence and the grave implication it has on the defence case I have paid particular attention to PW9's demeanour while he was giving evidence particularly under cross examination. I am satisfied that he is a witness of truth and that it is safe to rely on his testimony. I am mindful of the fact that demeanour or being unshaken in cross examination is not the acid test for truth because an accomplished liar can be a convincing witness but in the case of PW9 I have no reason to doubt his credibility and reliability as a witness.

[65] I accept PW9's testimony that he had nothing to do with the drug and that cell phone number 0128501282 did not belong to him and nor did he have any knowledge about this number. I also accept his evidence that he never called the accused using that number on 29 January 2010 or at any other time. I reject the accused's allegation that he had been tricked by PW9 into collecting the package.

[66] The accused alleged that PW9 texted to him the consignment number of the package at 9.31am on 29 January 2010. This is a material allegation which if true would undermine PW9's evidence that he knew nothing about the package. However no weight should be given to this allegation as it was not put to PW9 during cross examination. Any material allegation against any prosecution witness affecting any material aspect of the defence case in which the witness had a share must be put to the witness concerned so as to give him the opportunity to either confirm or deny the allegation. It is against the principle of fairplay to withhold the allegation when the witness was still in the witness box and then to make the allegation when he has gone home.

[67] I am convinced that no one asked the accused to collect the package. It was his package and he went to collect it. PW9 is the accused's best friend. There is no reason for him to put his best friend's life on the line. Even the accused himself when asked in cross examination could not think of a reason why PW9 would want to victimise him. The simple truth is, the accused tempted fate and got caught.

[68] The accused called DW6 to support his defence. It is plain that the primary purpose of calling DW6 was to show that the accused had no access to cell phone number 0128501282 but that his brother PW9 did. I have considered DW6's evidence and test

A it against the testimony of PW9, the testimony of the accused and the probabilities of DW6's assertion and I have no doubt that DW6 had come to court to tell deliberate lies in an attempt to save the accused. I do not accept his evidence that PW9 occasionally had access to cell phone number 0128501282. He
B mentioned Santo Hendraman who according to him owned cell phone number 0128501282 but conveniently claimed that this person disappeared after PW9 and the accused were arrested. I am inclined to believe that this Santo Hendraman is a fictitious character which DW6 conjured up to cast doubts on the
C testimony of PW9.

[69] The accused's defence is plainly a defence of no knowledge, in rebuttal of the presumption under s. 37(d). It is a total avoidance in the sense that if he succeeds in proving lack of
D knowledge he is not only entitled to be acquitted of the offence charged but is entitled to be acquitted of all offences under the Act including the lesser offence of possession because without proof of the mental element, possession cannot be criminal.

E **[70]** I have considered the defence explanation carefully to determine if it is more likely than not that the accused had no knowledge about the drug in the package. Having regard to the totality of the evidence and the probabilities of the case I am unable to arrive at such finding. I am satisfied that the accused
F has failed to rebut the presumption of knowledge under s. 37(d) of the Act. It is also my finding that he has failed to raise any reasonable doubt as to whether he had such knowledge or otherwise.

G **[71]** As for the presumption of trafficking which applies against him, the accused did not produce any evidence to show that the drugs were not for the purpose of trafficking. In the absence of such evidence there is no material before the court to justify a finding that it is more likely than not that the drug was not for the purpose of trafficking. Therefore the presumption of trafficking
H remains unrebutted and established by default. Going by the *dictum* in *Yuvaraj, supra*, the accused must be convicted of the offence charged.

[72] Assuming I am wrong in my application of *Yuvaraj*, I have
I considered whether the accused's explanation though rejected has cast a reasonable doubt in my mind as to whether the drug was for the purpose of trafficking or for any other purpose unrelated

to trafficking. I am satisfied that his explanation has failed to cast any reasonable doubt in the prosecution's case. It is not just any doubt that entitles the accused person to an acquittal. As Sharma J said in *PP v. Saimin & Ors* [1971] 1 LNS 115:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is the state of the case which after the entire comparison and consideration of all the evidence leaves in the mind of the juror in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[73] On the degree of proof required to establish a case beyond reasonable doubt Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372 opined as follows:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[74] I am satisfied that the case against the accused has been proved beyond any reasonable doubt. Accordingly the accused was convicted of the offence charged.